IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE KURIAN JOSEPH
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

WEDNESDAY, THE 31ST OCTOBER 2007 / 9TH KARTHIKA 1929

FAO.No. 2 of 2007()

I.A.No.496/2004 in LAR.106/1996 of ADDL.SUB COURT,KOLLAM
.....

APPELLANT/CLAIMANT:

SHAHIDA BEEVI,
LAJ BHAVAN, KOTTAKKERAM CHERRY, EZHIPPURAM,
PARIPPALLY, KOLLAM.

BY ADV. SRI.P.B.SURESH KUMAR

RESPONDENTS: RESPONDENT:

STATE OF KERALA,
REPRESENTED BY THE DISTRICT COLLECTOR, KOLLAM.

BY GOVT.PLEADER SMT.K.R.DEEPA

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 31/10/2007, ALONG WITH FAO NO.23 OF 2007 FAO NO.54 OF 2007 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:-

KURIAN JOSEPH & K.T.SANKARAN, JJ.

F.A.O.Nos.2, 14, 23 & 54 of 2007

Dated this the 31st day of October, 2007

JUDGMENT

Kurian Joseph,J.

Common issues arise in these appeals. The appellants were claimants before the respective reference courts. It is seen that the reference courts in these cases disposed of the references without answering the reference on merits on the ground that the appellants who are respondents before the reference court did not adduce any evidence. Thereafter attempts were made for reopening the judgments under Order 9 Rule 9/Order 9 Rule 13, read with Section 151 of the CPC. Those applications were also dismissed. Hence the appeals.

2. The questions which arise for consideration are:

(1) whether a reference can be refused to be answered by the reference court on the ground that the claimant was absent or on the ground that the claimant did not adduce any evidence;

(2) in the event of such a disposal, in case the claimants making an attempt for reopening, what should be the procedure.

3. As to whether the reference court is bound to answer the reference on merits, the issue is no more res integra. In Krishna Pillai v. State of Kerala, 1988 (2) KLT 898, Thomas,J. as His Lordship then was, has held that "even if no evidence is adduced, the court has to pass an order either maintaining the amount specified in the award passed by the learned Acquisition Officer, or enhancing it on account of some valid reasons. .... Absence of the person interested in the land will not divest the court of its jurisdiction to pass the award envisaged in S.28 of the Act. If the court dismisses a reference for default, it tantamounts to refusal to answer the reference which is not warranted by the provisions of the Act. ..... When there is a reference to the civil court, such reference has to be answered irrespective of the presence or absence of the person interested."

4. In Joseph v. Government of Kerala, 1991(2) KLT 69 a Division Bench of this Court has endorsed and reiterated the position. To quote:-

> "When a reference is made to the Court under S.18 of the Land Acquisition Act, it is the duty of the Court to determine the amount of

> compensation payable for the land acquired. The Court cannot refuse to determine the amount of compensation even where the claimant remains absent or fails to adduce evidence. The court is bound to pass an award. It cannot dismiss the applications for default."

The Supreme Court in Khazan Singh v. Union of India, AIR 2002 SC 726 had occasion to consider the same issue wherein it has been held that "the reference made by a Collector under S.18 of the Land Acquisition Act, 1894 cannot be dismissed for default. The provisions of Ss.18, 20, 26 make it clear that the Civil Court has to pass an award in answer to the reference made by the Collector under S.18 of the Act. If any party to whom notice has been served by the Civil Court did not participate in the inquiry it would only be at his risk because an award would be passed perhaps to the detriment of the concerned party. But non-participation of any party would not confer jurisdiction on the Civil Court to dismiss the reference for default."

5. The principle underlying in all the above decisions is that in land acquisition references, it is the duty of the reference court to determine the market value of the land and the compensation

payable to the land owner, in the event of a request by him for such determination. As held by the Supreme Court in Chimanlal v. Special Land Acquisition Officer, Poona, AIR 1988 SC 1652, the award passed by a Land Acquisition Officer is to be treated by the court only as an offer made by the officer to the land owner and if the owner is not satisfied by the fixation of market value or the award of compensation, he is entitled to make a request for reference within the stipulated time to the civil court. Once such a valid request is made to the reference court, it is the duty of the court to fix the market value and also fix the proper compensation. The claimant or person interested before the reference court is to be treated as a plaintiff and the Land Acquisition Officer to be a defendant for the purpose of answering the reference. Under Rule 378 of the Civil Rules of Practice, Kerala it is provided that the procedure to be followed for the trial of a reference shall be that prescribed by the Code in respect of original suits. To the extent required, the Rule reads as follows:-

> "378. Service of notice and trial of references.- (1) The service of notice shall be as provided in Section 49 of the Land Acquisition Act.

(2) Subject to these rules, the procedure to be followed for the trial of a reference shall be that prescribed by the Code in respect of original suits.

(3) The application before the Collector for reference shall be treated as the plaint, and the investigation shall be with reference to the claim made therein.

(4) The claimants may, and, if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit, present a written statement setting out their claim in full.

(5) The Collector, the company and the local authority may, and if so required by the Court, shall, file a statement in reply.

(6) The statement filed under sub-rules (4) and (5) shall, together with the application for a reference, constitute the pleadings in the case, and the rules in Order VII and VIII of the Code shall apply mutatis mutandis to such statements.

(7) The provisions in Rule 69 of these rules shall apply to the examination of witnesses."

As per Section 53 of the Land Acquisition Act, 1894 "Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure, 1908, shall apply to all proceeding before the Court under this Act."

6. Whether for the non-appearance of the claimant, can he

be set ex parte is the next question. No doubt under Order 9 Rule 6 in case the defendant does not appear on the day notified for appearance he can be set ex parte. But as far as the proceedings on a reference under Section 18 of the Land Acquisition Act is concerned, in view of the obligation cast on the court to fix the actual market value and determine the proper compensation, even if the claimant is absent, the reference cannot be dismissed for default by setting the claimant-respondent ex parte. The Collector, under Section 19 of the Act, has to furnish the necessary particulars regarding the fixation made by him, to the reference court. To quote Section 19:-

> "19. Collector's statement to the courts
>
> (1) In making the reference, the Collector shall state for the information of the court, in writing under his hand, --
>
> (a) the situation and extent of the land, with particulars of any trees, buildings or standing crops thereon;
>
> (b) the names of the persons whom he has reason to think interested in such land;
>
> (c) the amount awarded for damages and paid or tendered under sections 15 and 17, or

> either of them, and the amount of compensation awarded under section 11;
>
> (cc) the amount paid or deposited under sub-section (3A) of section 17; and
>
> (d) if the objection be to the amount of the compensation, the grounds on which the amount of compensation was determined.
>
> (2) To the said statement shall be attached a schedule giving the particulars of the notices upon, and of the statements in writing made or delivered by, the parties interested respectively."

The court has to consider the materials available on record including the application made by the claimant before the Collector and there has to be an investigation with reference to the claims touching upon the matters under Section 23(1) which reads as follows:-

> "23. Matters to be considered in determining compensation.
>
> (1) In determining the amount of compensation to be awarded for land acquired under this Act, the court shall take into consideration --
>
> first, the market value of the land at the date of the publication of the notification under section 4, sub-section (1);
>
> secondly, the damage sustained by the person

> interested, by reason of the taking of any standing crops or trees which may be on the land at the time of the Collector's taking possession thereof;
>
> thirdly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of severing such land from his other land;
>
> fourthly, the damage (if any) sustained by the person interested, at the time of the Collector's taking possession of the land, by reason of the acquisition injuriously affecting his other property, movable or immovable, in any other manner, or his earnings;
>
> fifthly, if, in consequence of the acquisition of the land by the Collector, the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change; and
>
> sixthly, the damage (if any) bona fide resulting from diminution of the profits of the land between the time of the publication of the declaration under section 6 and the time of the Collector's taking possession of the land."

The reference court has also to answer the entitlement of the claims under Section 23(1A) in the matter of 12% additional compensation, Section 23(2) in the matter of 30% solatium on market value and interest on excess compensation under Section 28. Under Section 26(2), every such award passed by the reference court shall be deemed to be a decree. Thus it is the duty of the court to investigate on the claims made by the

claimant before the Collector for reference, under the guidelines already referred to above and fix the market value and determine the compensation. Even if the claimant does not co-operate with the court, the court has to look into the materials furnished by the Collector under Section 19 of the Act and pass an award on merits with regard to the claim regarding market value and compensation.

7. What is the course open to the claimant if in any case an application is dismissed for default or disposed of otherwise than on merits is the next question.

8. In Joseph v. Government of Kerala, 1991(2) KLT 69 (Supra) it has been held by the Division Bench of this court that an application under Order 9, Rule 9 read with Section 151 CPC is not maintainable. It was held so because the court had already held therein that the reference court cannot refuse to determine the amount of compensation even where the claimant remains absent or fails to adduce evidence. In Rajmani v. Collector, Raipur, (1996) 5 SCC 701, the Supreme Court held that if in any event the claimant is set ex parte, apart from the regular appeal

under Section 54 of the Land Acquisition Act, alternate remedy is also available under Order 9 Rule 9 read with Section 151 CPC. To quote:

> "Upon service of the notice on the claimant or interested person, he is treated to be a plaintiff and Land Acquisition Collector to be a defendant for the purpose of conducting the proceedings as envisaged under Section 22 of the Act. They are entitled to be represented by counsel. On receipt of the application, it is the duty of the claimant and burden is always upon him, who seeks higher compensation to adduce evidence and prove in the court that the compensation awarded by the Collector was inadequate and that the acquired lands were possessed of higher value for award of the compensation to be just and adequate compensation. The Land Acquisition Officer is to rebut the evidence adduced by the claimant/interested person. The burden is always on the claimant. Ultimately, it is the duty and power of the court to determine just and adequate compensation on relevant facts and law sitting in the armchair of a prudent purchaser in an open market. If the notice is not served on the claimant, he is deprived of his valuable opportunity. <u>If the award in such circumstances came to be passed after setting aside the claimant ex parte, though an appeal would lie under Section 54 of the Act against such an award, alternative remedy is also available. The appellate court may not be in a position to decide the correctness of the award except again to fall back upon the question whether notice was properly served on the</u>

> claimant and whether his remaining ex parte is correct in law. That question could equally be gone into on an application filed by the claimant either under Order 9 Rule 9 CPC or under Order 9 Rule 13 or Section 151 CPC. The appropriate provisions that would be applicable to the claimant would be Order 9 Rule 9 read with Section 151 CPC."

In Khazan Singh v. Union of India, AIR 2002 SC 726 the Supreme Court has observed that an application for restoration of a reference can be entertained under Section 151 of the CPC. As held by the Supreme Court in Rajmani's case, even if a regular appeal is filed under Section 54 in a case where a claimant has been set ex parte or where a reference has been dismissed for default, or where the reference is not answered on merits, the High Court will not be in a position to decide the correctness of the award and the matter normally would have to be remitted to the reference court. Such a situation can be avoided if the claimant is permitted to file a petition under Section 151 CPC simpliciter or under Section 151 read with Order 9 Rule 9 CPC before the reference court itself. In the event of such applications being filed, the reference court is bound to consider

the same on merits. Of course, if the non-participation is deliberate and intended only to protract the proceedings, it is for the reference court to deal with the application appropriately while fixing the terms. It is to be noted that the claimant is gaining an unmerited advantage owing to such delay since in the event of any enhancement, he will be getting handsome interest, presently at the rate of 15%. It will be well within the jurisdiction of the reference court to order that the claimant shall not be entitled to interest at the rate of 15% from the date of dismissal of the reference till restoration, apart from the terms as to costs.

In the result all these appeals are allowed. The impugned orders are set aside. The matters are remitted to the reference court. The reference court concerned is directed to pass fresh orders on I.A.No.496/2004 in L.A.R.No.106/1996, I.A.No.380/2006 in L.A.R.No.144/2003, I.A.No.491/2004 in L.A.R.No.105/1996 and I.A.No.492/2004 in L.A.R.No.85/1996 in the light of the observations made in this judgment within a period of two months from the date of receipt/production of a

copy of this judgment. The reference court shall thereafter answer the reference in accordance with law within another three months.

(KURIAN JOSEPH, JUDGE)

ahg. (K.T.SANKARAN, JUDGE)

' C.R.'

KURIAN JOSEPH &
K.T.SANKARAN, JJ.

F.A.O.Nos.2, 14, 23 &
54 of 2007

JUDGMENT

31st October, 2007